SERVED: May 2, 1996

NTSB Order No. EA-4446

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of April, 1996

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| Application of<br><br>RODGER B. GORDON<br><br>for an award of attorney and expert consultant fees and related expenses under the Equal Access to Justice Act (EAJA). | Docket 220-EAJA-SE-13394 |

**OPINION AND ORDER**

Applicant (respondent below) has appealed the initial decision and order of Administrative Law Judge William R. Mullins, denying his application for an award of attorney fees and costs under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.[1] For the reasons that follow, we grant the appeal, in part.

Applicant was charged with having damaged his aircraft while landing with his gear up at Noorvik, a remote airport in Alaska.

[1]A copy of the initial decision is attached.

Applicant was alleged to have then aborted the landing and operated the aircraft in an unairworthy condition for another 43 statute miles, finally landing at Kotzebue Airport. The Administrator's allegations were premised on the position that applicant knew or should have known that he had damaged his aircraft when it struck the ground, and that he should have then immediately discontinued his flight at Noorvik. At the time of the incident the aircraft was operated under the provisions of Part 135 of the Federal Aviation Regulations (FAR), and respondent was carrying a passenger and cargo.

At the conclusion of the evidentiary hearing, the law judge sustained the Administrator's allegation that applicant carelessly failed to lower the landing gear prior to landing, a violation of FAR § 91.13(a). However, the law judge dismissed the allegation of a violation of FAR § 91.7(b)(failure to discontinue flight in an unairworthy aircraft), because he accepted applicant's explanation that Noorvik was not a suitable landing site because of several factors, including the then-existing runway and weather conditions.[2]

Applicant testified at the hearing that because of the likelihood that his aircraft had sustained damage, he knew he would have to execute a no-flaps landing. This would have required at least 2,000 feet of runway. Because he had already

[2]The law judge also dismissed an allegation that applicant failed to use his landing checklist and he sustained an unrelated charge concerning crew rest. Finally, the law judge set aside the suspension because respondent had filed a timely report under the Aviation Safety Reporting System (ASRP).

initiated a go-around in response to the gear warning horn before the aircraft struck the ground, he believed that he was already too far down the runway to safely land without flaps. Applicant also felt that he could not attempt a no-flaps landing on this runway because it would have left him with an extremely small margin for error, particularly because he could see that the ends of the runway were blocked with snow. His only other option at that airport was to land on the other runway, but based on his observation of the wind sock, there was a 10-15 knot gusty cross wind that made this runway unsuitable as well. Applicant decided, therefore, that it would be safer to proceed to Kotzebue, which had much longer runways and equipment available for an emergency landing. Applicant presented the testimony of expert witnesses who opined that his actions, in light of his observations, were reasonable. The law judge agreed and dismissed the allegation.

The Administrator appealed the law judge's decision, limiting his appeal to the issue of the suitability of Noorvik as a landing site. In Order No. EA-4329 (March 10, 1995), we determined that applicant's decision to continue on to Kotzebue Airport would not be second-guessed, under the circumstances as he described them. We affirmed the law judge's initial decision. Applicant subsequently filed the instant EAJA application.

The EAJA requires the government to pay to a prevailing party certain fees and costs unless the government establishes that its position was substantially justified, or that special

circumstances would make an award of fees unjust. 5 U.S.C. § 504(a)(1). For the Administrator's position to be found substantially justified it must be reasonable in both fact and law, i.e., the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory. U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565 (1988). In his EAJA pleadings, applicant asserts that the Administrator was not substantially justified in pursuing the underlying allegations and that the Administrator was not substantially justified in pursuing an appeal to the Board. The Administrator, both in his response to the application and in his reply brief to the Board, contends that he was substantially justified in pursuing the allegations because he could not foresee that the law judge would find the opinions of applicants' experts more persuasive than those of the Administrator's witnesses. Neither party offers argument on the issue of whether there was substantial justification to support the Administrator's appeal to the Board, and the law judge denied the EAJA application without reaching this issue.

We agree with the law judge's conclusion that the Administrator was substantially justified in pursuing the underlying allegations to the hearing, and we adopt his initial decision on that issue as our own.[3] The FAA's failure to prevail

[3]We agree with the Administrator that applicant may not raise issues to the Board that were not asserted in his initial application. For example, applicant contends for the first time

on the merits does not preclude a finding that its position was nonetheless substantially justified under the EAJA. See U.S. Jet at 3. As we noted in Sites v. Administrator, NTSB Order No. EA-4146 at 4 (1994), the question is whether the Administrator relied on a reasonable interpretation of the physical facts in pursuing the complaint. We think he did, at least with regard to his position at the hearing. The Administrator possessed evidence showing that applicant, while operating a Part 135 aircraft with a passenger on board, carelessly attempted a landing with the gear up. The Administrator also had evidence that, after the aircraft struck the ground, applicant aborted the landing and operated the aircraft for another 43 miles, over dangerous terrain, even though he knew or should have known that his aircraft had sustained damage. The law judge's decision on the "suitable landing" issue was not a finding that the Administrator's allegations were baseless. The law judge found only that under the circumstances as applicant described them at the hearing, his exercise of judgment as to where to land deserved deference.[4]

Having made that finding, however, the law judge should have

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(…continued)
in this appeal that the hearing was in reality, litigation over the applicability of the ASRP. We will not address these new matters, which, in any event, are without merit.

[4]As to the other allegations contained in the complaint, the Administrator should not be precluded from taking action on other, unrelated charges, when they are clearly actionable, merely because they may appear to be less serious than the central charge. We are unaware of any precedent that sets such a standard.

separately evaluated the other issue raised by applicant, i.e., whether the Administrator was substantially justified in pursuing an appeal to the Board. Alphin v. National Transportation Safety Board, 839 F.2d 817 (D.C. Cir. 1988). Since he did not address this issue (in all likelihood because both parties failed to brief it), we will resolve the matter.

We do not think that a party to a Board proceeding should be discouraged in his right to appeal a decision merely because it was resolved below on credibility grounds. While the Board typically defers to a law judge's credibility findings because the law judge was in a position to evaluate the witnesses' demeanor, reasonable minds may differ on such matters, particularly where, as in these proceedings, there is a de novo review of the record by the Board, and we may consider other evidence contained in the record as requiring a different result. Thus, the Administrator may be substantially justified in appealing a given decision where, having re-evaluated his position following the hearing, he is convinced that the law judge's credibility findings are flawed. However, we do not believe that this requisite analysis took place here.

The record in this case reveals that the law judge rejected the Administrator's position, not necessarily because he found applicant most credible of all the witnesses, but because he found that the Administrator's position was based on a flawed investigation. The investigating inspector testified that in his opinion a landing at Noorvik would have been safer than operating

a presumably unairworthy aircraft another 15 minutes, even though he admitted on the stand that he had not visited the site immediately after the incident, he had not interviewed other users of the airport to determine the runway conditions at the time of the incident, and that he was completely unaware of the wind conditions and snow conditions on Noorvik's runways, which as applicant explained, were significant factors that entered into his decision to proceed to Kotzebue. Indeed, the Administrator's expert testified that he calculated the amount of runway applicant needed to make a no-flaps landing using zero wind conditions, because, inexplicably, he assumed there were no relevant wind conditions at the time of the incident because applicant had told him during the course of the investigation that the weather was VFR [visual flight conditions], i.e., visibility was clear. Thus, the law judge found, and we agreed, the investigator's calculations were fatally flawed and his opinion concerning the suitability of the remote landing site was not persuasive. Once the Administrator became aware of the flaws in his case, we think a re-evaluation of his position would have convinced him that an appeal to the Board stood little chance of prevailing. Since the Administrator's appeal brief fails to explain away or even acknowledge these flaws in the investigator's calculations, we think it is reasonable to conclude that such an analysis was not performed here. Applicant is therefore entitled to those attorney fees and costs incurred as a direct result of the Administrator's appeal to the Board.

**ACCORDINGLY, IT IS ORDERED THAT**:

1. Applicant's appeal is granted in part;

2. The initial decision is affirmed, except as to the issue concerning the Administrator's appeal. As to that issue, we find that he was not substantially justified in pursuing the appeal; and

3. The matter is therefore remanded to the law judge for such further proceedings as are necessary to determine an appropriate award of those attorney fees and costs incurred as a result of the Administrator's appeal.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.